

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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NADINE JAMES,

Plaintiff,

v.

DECISION AND ORDER  
11-CV-713

UNITED STATES OF AMERICA, GEICO  
GENERAL INSURANCE COMPANY, and  
KATE E. LOWENTHAL,

Defendants.

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The instant matter was referred to Magistrate Judge H. Kenneth Schroeder, Jr. pursuant to 42 U.S.C. §636(b)(1) for supervision of all pre-trial proceedings. The action was brought against the United States pursuant to the Federal Tort Claims Act, and involves damages for personal injuries sustained by plaintiff when she was struck by a vehicle driven by defendant Kate Lowenthal. Plaintiff alleges that, at the time of the accident, Lowenthal was acting within the scope of her employment as a resident physician at the Department of Veteran's Affairs ("VA"). Plaintiff also seeks declaratory judgment against defendant GEICO General Insurance Company ("GEICO"), pursuant to the Declaratory Judgment Act.

The United States made a motion to dismiss the complaint pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction. (Dkt. No. 30) Both GEICO and plaintiff cross-moved, pursuant to

Rule 56 of the Federal Rules of Civil Procedure, for summary judgment as to whether Lowenthal was acting in the scope of her employment for the VA at the time of the accident. (Dkt. Nos. 27 and 39) On January 3, 2014, Magistrate Judge Schroeder issued a Report and Recommendation recommending that the United States' motion to dismiss be granted, that GEICO's motion for summary judgment be denied, and that plaintiff's cross-motion for summary judgment be granted to the extent it seeks a ruling declaring that GEICO's denial of coverage was improper. (Dkt. No. 51)

Plaintiff filed objections to the Report and Recommendation on January 17, 2014 (Dkt. No. 52), and the United States responded on January 31, 2014 (Dkt. No. 53). On February 28, 2014, the Court heard oral argument and considered the matter submitted.

Pursuant to 28 U.S.C. §636(b)(1), this Court must make a *de novo* determination of those portions of the Report and Recommendation to which objections have been made. Upon *de novo* review, and after reviewing the submissions from the parties and hearing oral argument, the Court hereby adopts Magistrate Judge Schroeder's findings in their entirety.

Accordingly, for the reasons set forth in Magistrate Judge Schroeder's Report and Recommendation: (1) the United States' motion to dismiss for lack of subject matter jurisdiction is granted; (2) GEICO's motion for summary judgment is denied; and (3) plaintiff's cross-motion for summary judgment is granted to the extent it seeks a ruling pursuant to the Declaratory Judgment Act declaring null

and void GEICO's denial and disclaimer of coverage on the basis of a policy exclusion for persons protected under the Federal Tort Claims Act, but is denied in all other respects.

On or before March 31, 2014, the remaining parties to this case shall each submit a brief report to the Court as to what, if any, claims or issues remain for adjudication and, if there are issues or claims remaining, whether the Court either retains jurisdiction over the matter or should exercise supplemental jurisdiction pursuant to Section 1367 of Title 28 of the United States Code.

SO ORDERED.

*Richard J. Arcara*  
HONORABLE RICHARD J. ARCARA  
UNITED STATES DISTRICT JUDGE

Dated: March 15, 2014